



November 15, 2002

Mr. Gordon Bowman
Assistant County Attorney
Travis County
P.O. Box 1748
Austin, Texas 78767

OR2002-6525

Dear Mr. Bowman:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 172217.

The Travis County Juvenile Probation Department (the "department") received a request for information pertaining to the department's internal investigation of the Detention Services Division Staff retreat of June 11, 2002. The requestor specifically seeks the "complete investigation to include any statements" and "names and results of disciplinary action for all involved." You initially claim that the responsive information is not subject to disclosure under the Public Information Act (the "Act") as records of the judiciary. Alternatively, you claim that portions of the responsive information are excepted from disclosure under sections 552.101 and 552.117 of the Government Code.¹ We have considered your arguments and reviewed the submitted representative sample of information.²

¹We note that you have also marked one document as excepted under section 552.107. However, as you make no arguments to support withholding the document at issue under section 552.107, we find you have waived this exception. See Gov't Code §§ 552.0301(e), .302; Open Records Decision No. 630 at 4 (1994) (governmental body may waive section 552.107(1)).

²We assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. See Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

We first address your assertion that the requested documents constitute records of the judiciary. The Act generally requires the disclosure of information maintained by a "governmental body." See Gov't Code § 552.021. While the Act's definition of a "governmental body" is broad, it specifically excludes "the judiciary." See Gov't Code § 552.003(1)(A), (B). In Open Records Decision No. 646 (1996), this office determined that a community supervision and corrections department is a governmental body for purposes of the Act, and that its administrative records, such as personnel records and other records reflecting day-to-day management decisions, are subject to the Act. *Id.* at 5. On the other hand, we also ruled that specific records regarding individuals on probation and subject to the direct supervision of a court that are held by a community supervision and corrections department are not subject to the Act because such records are held on behalf of the judiciary. *Id.*; see Gov't Code § 552.003.

In this instance, the requestor seeks information that relates to administrative, rather than judicial, functions of the department. Upon review of the submitted information, we find that it does not constitute judicial records for purposes of the Act. See *id.* at 2-3 (citing *Benavides v. Lee*, 665 S.W.2d 151 (Tex. App.—San Antonio 1983, no writ)) (in determining whether governmental entity falls within judiciary exception, this office looks to whether governmental entity maintains relevant records as agent of judiciary with regard to judicial, as opposed to administrative, functions). Accordingly, the submitted information is subject to the Act, and we will address the exceptions you claim thereunder.

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Section 552.101 encompasses the doctrine of common-law privacy. Common-law privacy protects information if (1) the information contains highly intimate or embarrassing facts, the publication of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). The types of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. *Id.* at 683.

After reviewing the information at issue, we find that only a small portion of the information is protected from disclosure under the common-law right to privacy. See Open Records Decision Nos. 470 (1987) (public employee's job performance does not generally constitute his private affairs), 455 (1987) (public employee's job performances or abilities generally not protected by privacy), 444 (1986) (public has legitimate interest in knowing reasons for dismissal, demotion, promotion, or resignation of public employees), 423 at 2 (1984) (scope of public employee privacy is narrow). Accordingly, we conclude that the department must withhold only the information identifying information of current juveniles we have marked

under section 552.101 in conjunction with the common-law right to privacy. *See generally* Open Records Decision No. 394 (1983); *Cf.* Fam. Code § 58.007.

We note that you additionally argue that certain "school records" within the submitted information are excepted under section 552.101 in conjunction with common-law privacy. Upon review of these records, however, we conclude that they are not intimate or embarrassing, and therefore, they may not be withheld under common-law privacy. *Cf.* Open Records Decision No. 455 (1987) (applicants' educational training does not constitute kind of "intimate" information protected by disclosural privacy).

We note, however, that you have also marked the school records to be withheld under section 552.114 of the Government Code. Section 552.114 excepts from disclosure student records at an educational institution funded completely or in part by state revenue. This office generally applies the same analysis under section 552.114 and the federal Family Educational Rights and Privacy Act of 1974 ("FERPA"), section 1232g of title 20 of the United States Code. Open Records Decision No. 539 (1990). FERPA provides that no federal funds will be made available under any applicable program to an educational agency or institution that releases personally identifiable information (other than directory information) contained in a student's education records to anyone but certain enumerated federal, state, and local officials and institutions, unless otherwise authorized by the student's parent. *See* 20 U.S.C. § 1232g(b)(1). "Education records" means those records that contain information directly related to a student and are maintained by an educational agency or institution or by a person acting for such agency or institution. *Id.* § 1232g(a)(4)(A). A "student" is defined to include "any person with respect to whom an educational agency or institution maintains education records or personally identifiable information, but does not include a person who has not been in attendance at such agency or institution. *Id.* § 1232g(a)(6); *see also* 34 C.F.R. § 99.3. Section 552.026 of the Government Code provides as follows:

This chapter does not require the release of information contained in education records of an educational agency or institution, except in conformity with the Family Educational Rights and Privacy Act of 1974, Sec. 513, Pub. L. No. 93-380, 20 U.S.C. Sec. 1232g.

Thus, FERPA and the accompanying Government Code provisions govern the availability of student or education records held by educational agencies or institutions. *See* 20 U.S.C. § 1232g(b)(1); Gov't Code §§ 552.026, 552.114. FERPA generally does not govern access to records in the custody of governmental bodies that are not educational agencies or institutions. *See* Open Records Decision No. 390 at 3 (1983). An exception to this rule applies if the governmental body received the records from an educational agency under written consent of the student. 20 U.S.C. 1232g(b)(4)(B).

The information at issue pertains to a listing of courses taken and the grades and credits earned by an individual in attendance at an unspecified college or university. Assuming that the college or university in question is an educational agency for purposes of FERPA, *see* 20 U.S.C. § 1232g(a)(3), we believe the information at issue constitutes education records under FERPA while it is maintained by the college or university. Thus, we conclude that if the department received the records at issue from a college or university that is an educational agency for purposes of FERPA, pursuant to the written consent of the student, such information must be withheld from the requestor under FERPA. *See id.* § 1232g(a)(3), (b)(4)(B). We have marked the information subject to FERPA

You next indicate that the information submitted includes information excepted under section 552.117. Section 552.117(1) of the Government Code excepts from disclosure the home address and telephone number, social security number, and family member information of a current or former official or employee of a governmental body who requests that this information be kept confidential under section 552.024. Whether a particular piece of information is protected by section 552.117 must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). Therefore, the department may only withhold information under section 552.117 on behalf of a current or former employee who made a request for confidentiality under section 552.024 prior to the date on which the present request for this information was received. You state that "the vast majority of the applicable non-peace officer employees have" made such an election. Accordingly, we have marked the information that must be withheld under section 552.117(1) for those individuals who made a timely election under section 552.024.

For any individual that did not timely make the election under section 552.024, their social security numbers may nevertheless be made confidential under section 552.101. A social security number is excepted from required public disclosure under section 552.101 in conjunction with 1990 amendments to the federal Social Security Act, 42 U.S.C. § 405(c)(2)(C)(viii)(I), if it was obtained or is maintained by a governmental body pursuant to any provision of law enacted on or after October 1, 1990. *See* Open Records Decision No. 622 (1994). Prior to releasing any social security number information, you should ensure that no such information was obtained or is maintained by the department pursuant to any provision of law enacted on or after October 1, 1990.

To summarize, the department must withhold a portion of the submitted information we have marked under section 552.101 in conjunction with common-law privacy. The marked school records must be withheld from the requestor under FERPA if the department received the records at issue from a college or university that is an educational agency for purposes of FERPA, pursuant to the written consent of the student. The department must withhold the information we have marked under section 552.117(1) if the individuals whose information is at issue made a timely election to keep this information confidential under section 552.024. For those who did not timely make such an election, social security numbers must be withheld if they were obtained or are maintained by the department pursuant to any provision

of law enacted on or after October 1, 1990. The remainder of the submitted information must be released to the requestor.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

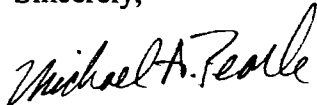
If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this

ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in black ink that reads "Michael A. Pearle". The signature is written in a cursive, flowing style.

Michael A. Pearle
Assistant Attorney General
Open Records Division

MAP/seg

Ref: ID# 172217

Enc. Submitted documents

c: Ms. Debbie Byington
Detention Services Division
Travis County Juvenile Probation Department
2515 South Congress Avenue
Austin, Texas 78704
(w/o enclosures)